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Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1223

PAUL E. PERRY,

Respondent.

versus

BALTIMORE CONTRACTORS, INC., and NEW AMSTERDAM CASUALTY COMPANY,

Petitioners.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

FRANK S. NORMANN,
DAVID R. NORMANN,
MARGOT MAZEAU,
Attorneys for Respondent, Paul E. Perry.

NORMANN & NORMANN,
Of Counsel,
1605 Hibernia Bank Building,
New Orleans, Louisiana 70112.

SUPREME COURT OF THE UNITED STATES
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PAUL E. PERRY,

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BALTIMORE CONTRACTORS, INC., and NEW AMSTERDAM CASUALTY COMPANY,

Petitioners.

Brief in Opposition to Petition for Writ of Certiorari.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

The following brief is submitted by respondent, Paul E. Perry, in opposition to the application for writ of certiorari filed by petitioners, Baltimore Contractors, Inc. and New Amsterdam Casualty Company.

Petitioners' primary contention is that the trial court and the Court of Appeal erred in awarding damages to respondent rather than restricting his re-

covery to benefits under the Louisiana Workmen's Compensation Act or, alternatively, under the Longshoremen's and Harbor Workers' Compensation Act. Since the locale of the accident and the instrumentality causing the accident are of the utmost importance in determining which law applies, and since petitioners have failed to mention the vital fact that the accident was caused by the negligent and/or incompetent operation of a vessel's gear, respondent deems it necessary to submit his Statement of the Case.

STATEMENT OF THE CASE.

At the time of the accident, October 13, 1959, respondent, a diver employed by Underwater Exploration and Salvage Company, Inc. was working at the bottom of a cofferdam which was being constructed in the Intracoastal Canal, a wide, navigable body of water carrying heavy marine traffic.

The bottom of the cofferdam was the bed of the canal, the top was open. The waters of the Intracoastal Canal had not been withdrawn from the cofferdam, but were being pumped back and forth. (R. 108.)

Alongside the cofferdam and afloat on the navigable waters of the Intracoastal Canal was the Barge WHIRLY II, owned by petitioner, Baltimore Contractors, Inc. and operated by its employees. (R. 104.) The compressor unit providing air to respondent was

stationed on the barge and was in operation. (R. 156.) The barge was equipped with a permanently mounted crane. (R. 104.) Attached to the crane was a clam bucket, which was being used to remove mud from the cofferdam after the divers completed "hand jetting" mud from the sides of the dam.

Notwithstanding the fact that the crane operator knew that no digging operations were to be performed while a diver was working in the waters of the cofferdam (R. 176, 179; 199-200; 209-210) and further knew that respondent was in the water at the time, he lowered the clam bucket and raised respondent from the water clamped between the jaws of the bucket. (R. 172.) Respondent sustained crushing injuries, including nine fractured ribs. After having been raised from the water, respondent was left suspended in air and then dropped back into the water.

The trial court awarded judgment in respondent's favor in the total amount of $44,092.55, which included proven loss of wages for the period of October 13, 1959, through 1963, in the sum of $16,623.60.

The Court of Appeal affirmed, holding, *inter alia*, that the vessel was clearly on navigable waters at the time of the accident and that under *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206, 83 S.Ct. 1185 (1963) respondent was entitled to recover. The Court of Appeal denied a rehearing and the Louisiana Supreme Court denied petitioners' application for writ of certiorari, following which petitioners retained new counsel to apply for writs to this Court.

ARGUMENT.

Reply to Point I.

Petitioners' contention that respondent's sole remedy is under the Louisiana Workmen's Compensation Act is based on two erroneous premises:

(1) Petitioners' statement that "Perry's injuries occurred while he was walking on the floor of a cofferdam" is factually and legally incorrect. Perry was at all times attached to the vessel by means of his airhoses, which were connected to the compressor unit stationed on the vessel; he was bodily lifted from the cofferdam by the gear of the vessel and was suspended from the vessel. Thus, his injury did not occur on land, as contended by petitioners, but upon navigable waters as held in *O'Keefe v. Atlantic Stevedoring Company*, 354 F.2d 48 (5th Cir., 1965). In the *O'Keefe* case, Curry, a longshoreman, while standing on the dock was bodily lifted therefrom by a metal band suspended from the ship's boom. The winch operator stopped the winch, dropping Curry into the waters of the slip between the vessel and the dock. He sustained a fractured skull and drowned. His widow filed a claim against the employer under the Longshoremen's and Harbor Workers' Compensation Act. The employer denied liability on the ground that the death did not result from an injury "upon navigable waters".

The Court of Appeal rejected defendant's contention holding that:

"The difficult problem is the determination as to the place where the injury occurred. It is the place where the injury occurred that determines whether there is Longshoremen's Compensation coverage. If the ship's boom had swung over the dock, striking and causing the death of Curry, we would not be able to find a basis for recovery under the Act. The place of the injury would have been the dock. It is true that when the causal chain of events commenced, Curry was on the dock and not upon navigable waters. But the beginning of the causal sequence was the lifting of Curry from the dock by the metal band suspended from the ship's boom. The boom was a part of the ship. Curry was lifted from the dock by the gear of the ship and was, within the meaning of the Act, suspended from the ship. He was off the dock and upon navigable waters when injured, and this is true whether his head struck the dock as he was lifted or whether he struck the ship or the dock while swinging from the boom or after he was dropped. We are firmly of the view that Curry sustained his injury over navigable water." 354 F.2d at 50.

(2) Respondent is seeking recovery herein for a maritime tort committed by a vessel on navigable waters. Thus, irrespective of whether the injury occurred on land or on navigable waters, respondent is not limited to seeking recovery under the Louisiana Workmen's Compensation Act. As was held in

Matherne v. Superior Oil Co., 207 F.S. 591 (E.D. La., 1962):

> "Whether the Louisiana Statute is exclusive for compensation purposes is immaterial *so long as maritime jurisdiction is properly invoked.*" (Emphasis supplied.)

That maritime jurisdiction is properly invoked in this case is evidenced by the applicability of the Admiralty Extension Act, Title 46, Sec. 740 of the United States Code, which provides as follows:

> "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, *to person* or property, *caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land* * * *." (Emphasis supplied.)

Petitioners advanced the identical argument before the Court of Appeal, which rejected same holding that:

> "* * * The barge upon which the clam bucket was dropped into the cofferdam, was clearly on navigable waters. It is the opinion of this Court, however, that the case of *Gutierrez v. Waterman Steamship Corporation*, 373 U. S. 206, 83 S.Ct. 1185, 10 L.Ed.2d 297 (1963) makes it unimportant whether or not the water in the cofferdam should be or should not be decreed to be navigable waters. In that case, a longshoreman sued the

vessel owner for injuries sustained on the dock and the court held as follows:

'Respondent contends that it is not liable, at least in admiralty, because the impact of its alleged lack of care or unseaworthiness was felt on the pier rather than aboard ship. Whatever validity this proposition may have had until 1948, the passage of the Extension of Admiralty Jurisdiction Act, 62 Stat. 496, 46 U.S.C. § 740, swept it away when it made vessels on navigable water liable for damage or injury "notwithstanding that such damage or injury be done or consummated on land." Respondent and the carrier amici curiae would have the statute limited to injuries actually caused by the physical agency of the vessel or a particular part of it—such as when the ship rams a bridge or when its defective winch drops some cargo onto a longshoreman. * * * Nothing in the legislative history supports so restrictive an interpretation of the statutory language. *There is no distinction in admiralty between torts committed by the ship itself and by the ship's personnel while operating it* * * *.' (Emphasis supplied) 83 S.Ct. at 1188.

We, therefore, do not see any merit in defendants' first allegation that the Louisiana Workmen's Compensation Act should apply. * * *" 202 So.2d at 700-701.

The case of *American Export Lines, Inc. v. Revel*, 266 F.2d 82 (4th Cir., 1959), relied upon by petitioners for the proposition that a person injured on the dock (an extension of land) is restricted to the remedies provided under the local compensation act notwithstanding the enactment of the Admiralty Extension Act, is inapplicable. In the instant case, respondent's injury occurred on navigable waters, see, *O'Keefe v. Atlantic Stevedoring Co.*, 354 F.2d 48 (5th Cir., 1965), and not on land. Even more significant, the *American Export Lines* case, *supra*, was impliedly overruled by this Court in *Gutierrez v. Waterman Steamship Corp.*, *supra*.

Petitioners are attempting to distinguish the *Gutierrez* case from the one before the Court on the ground that the work performed in *Gutierrez, supra*, was of maritime concern whereas the work performed by this respondent was of local concern. The distinction between work of so-called local concern and work of general maritime concern has been completely abrogated by this Court in the case of *Calbeck v. Travelers Insurance Company*, 370 U.S. 114, 82 S.Ct. 1196 (1962) as follows:

> "There emerges from the complete legislative history a congressional desire for a Statute which would provide federal compensation for all injuries to employees on navigable waters; * * * The statute's framers adopted this scheme in the Act because they meant to assure the existence of a compensation remedy for every such injury,

without leaving employees at the mercy of the uncertainty, expense, and delay of fighting out in litigation whether their particular cases fell within or without state acts under the 'local concern' doctrine. * * *" 82 S.Ct. at 1200.

"Congress brought under the coverage of the Act all such injuries whether or not a particular one was also within the constitutional reach of a state workmen's compensation law * * *" 82 S.Ct. at 1203.

"* * * It is sufficient to say that Congress intended the compensation act to have a coverage co-extensive with the limits of its authority and that the provision 'if recovery * * * may not validly be provided by State law' was placed in the act not as a relinquishment of any part of the field which Congress could validly occupy but only to save the act from judicial condemnation, by making it clear that it did not intend to legislate beyond its constitutional powers * * * *In the application of the act, therefore, the broadest ground it permits of should be taken.*" 82 S.Ct. at 1205. (Emphasis supplied.)

In conclusion, respondent submits that the accident occurred on navigable waters, thus entitling him to recovery against Baltimore Contractors, Inc., a "third party" within the meaning of the Longshoremen's and Harbor Workers' Compensation Act, and, further, that irrespective of the situs of the injury, respondent is entitled to recover from Baltimore Con-

tractors, Inc., the vessel owner, under the holding of *Gutierrez v. Waterman Steamship Corp., supra.*

Reply to Point II.

The Longshoremen's Act, as distinguished from the Louisiana Workmen's Compensation Act, does not recognize the concept of statutory employment, but treats the general contractor, such as Baltimore, as a "third party", amenable to suit for damages. 33 USC 933.

Petitioners claim that they are not "third parties" and rely on Sections 904 and 905 of the act, which, they claim, grant them immunity from tort liability. Section 904 states as follows:

> "Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908 and 909 of this title. In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment."

Section 905 provides:

> "*The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee,* his legal representative, husband or wife, parents, dependents, next of kin, and

anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death." (Emphasis supplied.)

These sections evidence the intent of Congress to protect an employee against an irresponsible and insolvent employer by providing that the general contractor shall be liable for and secure the payment of compensation benefits in the event the subcontractor and immediate employer has failed to do so.

Section 905 of the Act specifically states that:

"If an employer fails to secure[1] payment of compensation as required by this chapter, an injured employee * * * *may elect to claim compensation under this chapter or to maintain an action at law or in admiralty for damages on account of such injury or death.*" (Emphasis supplied.)

In construing Sections 904 and 905 with respect to the liability of a general contractor, the Fifth Circuit

[1] Title 33 USC, Section 932 provides that payment of compensation shall be secured either through insurance or by having the employer qualify as a self-insurer by complying with the requirements of the Secretary.

Court of Appeal in the case of *Probst vs. Southern Stevedoring Company,* 379 F.2d 763 (5th Cir., 1967) held:

> "The purpose of §904 is to effectually assure payments of benefits. The general contractor has a secondary, guaranty-like liability. The Act does not make the general contractor the 'employer'. It is only the 'employer' who can get under the immunity umbrella of § 905."

Thus, Baltimore Contractors, Inc. not being the "employer" of the respondent herein, is not entitled to immunity from tort liability.

If respondent's employer, Underwater, had secured the payment of compensation under the Act, respondent would have two remedies:

(a) A claim against his employer for compensation benefits under the Act and (b) an action at law or in admiralty against Baltimore as a "third party" under Section 933 of the Act.

Since Underwater did not secure the payment of compensation, respondent may, if he so elects, present a claim for compensation benefits against Baltimore under Section 904. However, and this is the important point, in all cases where the employer fails to secure the compensation the employee has an absolute right to elect between a compensation and a tort remedy. Section 904 in no way restricts this election to actions against the employer only. Were

it otherwise, an employee would be deprived of his action in tort against a third party by the unilateral action of his immediate employer. The quoted sections of the act do not support petitioners' contention that a contractor's liability under the act ipso facto extinguishes his liability in tort. Of course, there is no question but that respondent cannot recover twice from the contractor, once under the act and, in addition, in tort. However, respondent can elect whether or not he wishes to proceed against the contractor for compensation or for damages.

The case of *Thomas v. George Hyman Construction Company,* 173 F.Supp. 381 (D.C., 1959), relied upon by petitioners, is inapposite from either a legal or factual viewpoint. In that case, both the employer and contractor had provided compensation coverage. The Court rejected the contractor's defense of tort immunity stating that:

> "The law does not accord to the general contractor the choice of either carrying Workmen's Compensation insurance, or subjecting himself to liability for negligence."

The Court did not pass on the issue as to whether or not a general contractor would be immune from tort liability in those cases where the subcontractor failed to provide compensation, but merely stated, in rather loose language, that:

> "In such a contingency, the general contractor may well be free of all other liability if he in fact carried such insurance."

This statement, which does not even amount to dictum, certainly does not support petitioners' argument that an employee can be denied his tort remedy against a third party-general contractor merely because his immediate employer failed to carry insurance. The Longshoremen's Act, like the Louisiana Compensation Act, has to be liberally construed. If Congress had meant to grant immunity to a general contractor in such a case as this, they would have done so by express language. Not having granted such immunity, the only legal and equitable interpretation of Sections 904 and 905 would dictate that the employee has a right to elect his remedy and proceed against the contractor for damages.

Finally, it should be noted that the Longshoremen's and Harbor Workers' Compensation Act does not provide the exclusive remedy even as between an employee and his employer. In those cases, where the employer is also the owner and/or operator of the vessel, the employee has an absolute right to sue for damages, notwithstanding the fact that the employer has provided payments under the act. *Jackson v. Lykes Bros. Steamship Company,* 386 U.S. 731, 87 S.Ct. 1419 (1967).

In conclusion, it is submitted that a general contractor is a "third party" under Section 933 of the Longshoremen's Act and, as such, amenable to suit in tort. Alternatively, even if the general contractor were held to be the "employer" of the respondent, a holding which would be in direct conflict with the explicit language of the Act, respondent would, never-

theless, be entitled to bring an action for damages against Baltimore Contractors, Inc. as the owner and operator of the vessel, the WHIRLY II, under the holding of this Court in *Jackson v. Lykes Bros. Steamship Co.*, 386 U.S. 731, 87 S.Ct. 1419 (1967).

Reply to Point III.

Petitioners' final contention that they are entitled to indemnification under the *Ryan* doctrine is completely and totally without merit. At no time, through the pendency of this litigation, which commenced on May 12, 1960, almost eight years ago, did petitioners ever contend in pleadings or in argument that they were entitled to such indemnification.

Reference to the pleadings will show that petitioners filed a third-party demand against Underwater Exploration Company, Inc. and Paul Perry, in which they allege that the only relief afforded respondent is under the Louisiana Workmen's Compensation Act and in which they seek indemnification from third-party defendants under the provisions of Louisiana Revised Statutes, Title 23, Section 1063. Since the judgment awarded respondent in the instant case is not for benefits under the Louisiana Workmen's Compensation Act, the third-party petition was properly denied.

Not only is the demand for indemnification improper, in that it is being raised here for the very first time[2] there is not a scintilla of evidence

[2] *Neely v. Martin E. Eby Construction Co.*, 87 S.Ct. 1072 (1967) to the effect that this Court will not normally consider issues which have not been presented to the Court of Appeal.

which would support petitioners' contention that Underwater Exploration Company, Inc. breached any implied warranty of workmanlike service. On the contrary, the evidence conclusively shows that petitioner, Baltimore Contractors, Inc. had expressly agreed not to conduct any digging operations while a diver was working in the cofferdam, and that they breached such agreement in total disregard of the safety of respondent herein.

CONCLUSION.

In conclusion, respondent submits that the judgment below is correct and that the application for writ of certiorari should be denied.

Respectfully submitted,

FRANK S. NORMANN,
DAVID R. NORMANN,
MARGOT MAZEAU.

CERTIFICATE.

I, Frank S. Normann, a member of the bar of this Court, do hereby certify that I have this day served a copy of the above and foregoing brief to petitioners' counsel of record, Benjamin W. Yancey, Esq. and G. Edward Merritt, Esq., by mailing a copy thereof, postage prepaid, to them at their offices at New Orleans, Louisiana, on this ..... day of March, 1968.

FRANK S. NORMANN.